

3. The BOCs misrepresent other purported sources of congestion in the internet

While the digital backbone networks are not the source, the BOCs are correct in noting that the internet is experiencing congestion problems. The sources of this congestion are typically acknowledged to be lack of capacity at the Network Access Points ("NAPs"), which are publicly-available central points of interconnection located at several sites across the country.<sup>49</sup> Similarly, routers currently deployed by ISPs, which typically are not adequately "scalable" to accommodate substantial increases in demand, also contribute to congestion.<sup>50</sup> U S West similarly complains that, in its territory, internet service provider points of presence are far apart, requiring extensive backhauling of traffic.<sup>51</sup>

Industry participants are pursuing a variety of strategies to address these problems: Network operators are actively deploying new points of interconnection, equipment manufacturers are exploring new internet protocol switching technology, and ISPs are actively establishing private peering arrangements to obviate the need to interconnect at NAPs, and to deploy additional points of interconnection throughout the country. It is important to note, however, that nothing prevents the BOCs from actively participating in these solutions now. Bell Atlantic Internet Solutions and U S West !NTERPRISE currently operate their own internet

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simply has no effect in the context of a robustly competitive market such as the market for internet access and services.

<sup>49</sup> E.g., W. Wilson, *Hitching a Speedier Internet Ride: InterNAP Can Bypass Access Points Clogged by Soaring Use*, Seattle Post-Intelligencer, B4 (June 2, 1997); K. Hart, *ISPs divided over hub bottlenecks*, Communications Week International, available in 1996 WL 8647413 (Nov. 25, 1996).

<sup>50</sup> E.g., B. Phillips, *IP Switches Help Relieve Congestion – ISPs get ready to shift from routers*, CommunicationsWeek, T21 (May 5, 1997).

<sup>51</sup> U S West at 23 and *passim*.

networks within the BOCs' service areas, and they are free to deploy internet technology anywhere in the country. Nothing in the Communications Act or in the Commission's regulations prevent the BOCs from establishing expansive peering arrangements with other ISPs, or from constructing new NAPs, or from developing IP switching technology. The deregulation of BOC data networks and services simply is not implicated by these real solutions to internet congestion.

Finally, Bell Atlantic and Ameritech suggest that announced mergers of competitive carriers that control large portions of internet backbone networks reflect a dangerous level of "consolidation" that somehow will restrict other carrier's access to the internet.<sup>52</sup> Coming from Bell Atlantic – a carrier that has just completed the largest telecommunications merger in American history, involving two dominant LECs with contiguous service areas – this argument is disingenuous, to say the least. The concerns raised by Bell Atlantic and Ameritech in this regard are purely speculative, and provide no basis for the deregulation of the company.

### **III. THE BOCs' OWN RECENT CONDUCT HAS BEEN A MAJOR BARRIER TO THE DEVELOPMENT OF ADVANCED SERVICES AND FACILITIES WITHIN THEIR SERVICE AREAS**

At the same time the BOCs have been raising imaginary impediments to the development of advanced data networks and services, they have been actively placing their own impediments in the way of ISPs that are attempting to interconnect with them or are seeking to use portions of the BOCs' networks to expand their own capabilities. Intermedia discusses several examples below.

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<sup>52</sup> Ameritech at 9-10; Bell Atlantic at 9-10, 13-14.

1. Withholding payments of mutual compensation to CLECs for calls that originate on the BOC network and terminate to ISPs located on CLEC networks

Ameritech, Bell Atlantic, and U S West have taken the position that calls made to ISPs located on a CLEC's network are not "telephone exchange service" as defined by the Telecommunications Act of 1996, and so are not subject to the mutual compensation provisions of the Act. The result of this position is that the BOCs have unilaterally withheld payment of mutual compensation to Intermedia and other CLECs. In Intermedia's case, the BOCs have withheld hundreds of thousands of dollars for local calls to ISPs that Intermedia has terminated over its network. The BOCs take this position despite the fact that: 1) their interconnection agreements with Intermedia contain no language excluding calls to ISPs from mutual compensation, 2) these calls are rated as local calls, under the BOCs' local service tariffs and are otherwise indistinguishable from other local calls for which payment of mutual compensation is mandatory, 3) the BOCs have not even proposed a method of identifying these calls and segregating them from other local traffic, and 4) the Intermedia/BOC interconnection agreements expressly oblige the parties to negotiate billing disputes and ultimately to refer them to the relevant state public service commission, and do not authorize unilateral withholding of payments.

The BOCs have forced Intermedia and other CLECs to file complaints and to participate in proceedings before state commissions to resolve this matter. To date, Intermedia has found it necessary to expend resources to participate in complaints against the BOCs in several states. Moreover, the BOCs are continuing unilaterally to refuse to pay mutual compensation despite the fact that every state public service commission in the country that has addressed the issue has found that ILECs are obligated to pay mutual compensation for local calls to ISPs. Of the 15

state commissions that have made such rulings,<sup>53</sup> nine are in the Ameritech, Bell Atlantic, and U S West service areas.

<sup>53</sup> E.g., Arizona Corporation Commission: *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc., Pursuant to 47 U.S.C. § 252(b) of the Telecommunications Act of 1996*, Opinion and Order, Decision No. 59872, Docket No. U-2752-96-362 (Oct. 22, 1996);  
Colorado Public Utilities Commission: *Petition of MFS Communications Company, Inc. for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with U S West Communications, Inc.*, Decision No. C96-1185 Regarding Petition for Arbitration, Docket No. 96A-287T (Nov. 5, 1996);  
Connecticut Department of Public Utility Control: *Petition of Southern New England Telephone Company for a Declaratory Ruling Concerning Internet Services Provided Traffic*, Docket No. 97-05-22 (Sept. 17, 1997);  
Illinois Commerce Commission: *Teleport Communications Group, Inc., vs. Illinois Bell Telephone Company, Ameritech Illinois: Complaint as to dispute over a contract definition*, Opinion and Order, Docket No. 97-0404 (March 11, 1998);  
Michigan Public Service Commission: *Application for Approval of an Interconnection Agreement Between Brooks Fiber Communications of Michigan, Inc. and Ameritech Information Industry Services on Behalf of Ameritech Michigan*, Opinion and Order, Case No. U-11178, etc. (Jan. 28, 1998);  
Minnesota Department of Public Service: *AT&T Communications of the Midwest, Inc.*, Order Resolving Arbitration Issues, Docket No. P-442/M-96-855 (Dec. 2, 1996);  
New York Public Service Commission: *Proceeding on Motion of the Commission to Investigate Reciprocal Compensation Related to Internet Traffic*, Case 97-C-1275, Order Closing Proceeding (March 19, 1997).  
North Carolina Utilities Commission: *Interconnection Agreement Between BellSouth Telecommunications, Inc. and US LEC of North Carolina, Inc.*, Order Concerning Reciprocal Compensation for ISP Traffic, Docket No. P-55, SUB 1027 (Feb. 26, 1998);  
Oregon Public Utility Commission: *Petition of MFS Communications Company, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996*, Order No. 96-324 (Dec. 9, 1996);  
Virginia State Corporation Commission: *Petition of Cox Virginia Telecom, Inc., for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet service providers*, Final Order, Case No. PUC970069 (Oct. 24, 1997);  
Washington Utilities and Transportation Commission: *Petition for Arbitration of an Interconnection Agreement Between MFS Communications Company, Inc. and US West Communications, Inc., Pursuant to 47 USC § 252*, Docket No. UT-960323 (Jan. 8, 1997), *aff'd U S West Communications, Inc. v. MFS Intelenet, Inc.*, No. C97-222WD (W.D. Wash. Jan. 7, 1998);

(continued...)

The fact that the BOCs have taken this patently unreasonable position – and continue to adhere to it despite adverse decisions by every state commission that has heard this issue – indicates that their purpose is to delay making payments to CLECs for as long as possible, and to make the CLECs spend time, money, and personnel resources in prosecuting complaints in every state in order to enforce their rights to the mutual compensation that is required by the Communications Act. Not only does this position reflect patent bad faith, it indicates an unambiguously anticompetitive intent to do as much financial harm to competing carriers as possible. Of course, it directly and adversely impacts competitive providers and users of internet service, and is one of the most substantial impediments to increasing end users' access to advanced internet

2. Refusal to establish interconnection agreements for frame relay services

Frame relay is a packet-switched data service that is one of the most widely deployed of the advanced data services, and is one of the most important of Intermedia's service offerings. Intermedia has been able to establish voluntary negotiated agreements for the interconnection of frame relay services with most of the Tier 1 ILECs. Ameritech, however, refused to establish such an agreement, arguing that frame relay is not an "exchange service" as defined by the Telecommunications Act of 1996. In taking this position, Ameritech forced Intermedia to arbitrate this issue in three states. Ultimately, Ameritech settled the issue after the first

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West Virginia Public Service Commission, MCI Telecommunications Corporation  
*Petition for arbitration of unresolved issues for the interconnection negotiations between MCI and Bell Atlantic - West Virginia, Inc., Commission Order, Case No. 97-1210-T-PC (Jan. 13, 1998).*

administrative law judge's interim decision was issued in Intermedia's favor. Nevertheless, Ameritech's refusal to interconnect forced Intermedia to make a substantial and unnecessary investment in time, legal expenses, and personnel resources. This is particularly disturbing to Intermedia because, recently, other ILECs have begun to argue that the interconnection, unbundling, and resale provisions of the Act apply only to voice services. Any action granting the BOC petitions may therefore negate the negotiating process for interconnection agreements that Intermedia has undertaken to date.

#### **IV. THE BOCs' INTERPRETATION OF § 706 CANNOT REASONABLY BE INTERPRETED TO ELIMINATE OTHER PROVISIONS OF THE ACT OR ESTABLISHED REGULATORY STRUCTURES**

For the most part, the BOCs are straightforward in acknowledging that the purpose of their petitions is to insulate their data networks and services from the procompetitive requirements of the Telecommunications Act of 1996, including the obligations to provide interconnection and unbundled network elements at incremental cost, to pay mutual compensation for the transport and termination of exchange service, to resell their retail services at wholesale rates, and the obligation to demonstrate that they are doing all of these things before they can receive authority to provide in-region interLATA service. As noted earlier in these comments, however, if the BOC petitions are granted, the BOCs could selectively insulate from the procompetitive provisions of the Act *any* service, simply by migrating it over to high-capacity packet-switched facilities.

The BOCs advance no credible argument that § 706 can reasonably be interpreted to eviscerate the procompetitive provisions of §§ 251, 252, and 271. In fact, § 706 expressly charges the Commission to conduct a public interest determination in exercising its forbearance rights, and further charges the Commission to utilize "measures that promote competition in the

local telecommunications market. . . .”<sup>54</sup> The Commission has already determined that fully enforcing the procompetitive provisions of §§ 251, 252, and 271 are essential to the public interest,<sup>55</sup> and cannot sanction the wholesale removal of those requirements from the most dynamic services and technologies being developed.

In its Order denying Ameritech’s petition for interLATA relief in Michigan, the Commission noted that its public interest inquiry under the Act must be a broad one. The Commission concluded that its public interest analysis must include an assessment of whether all “procompetitive entry strategies are available to new [local exchange] entrants.”<sup>56</sup> Moreover, the Commission emphasized that it must consider whether conditions are such that the local market will remain open as part of the public interest analysis.<sup>57</sup> Because the BOCs’ interpretation of § 706 would allow them to exclude whole categories of services from interconnection, it would deny CLECs critical procompetitive entry strategies, and is therefore inconsistent with the public interest determinations that the Commission has already made.

The BOCs claim that their petitions would not insulate “bottleneck” services from the interconnection and related requirements of §§ 251 and 252 of the Act. These BOCs argue that they will offer as unbundled network elements the copper loops that can be conditioned to handle xDSL services.<sup>58</sup> This argument is specious, however, and must be rejected. As Intermedia discussed earlier in these comments, DSL technology is being deployed extensively throughout

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<sup>54</sup> 47 U.S.C. § 706(a).

<sup>55</sup> *Application of Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Aug. 19, 1997 (“*Ameritech-Michigan Order*”).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

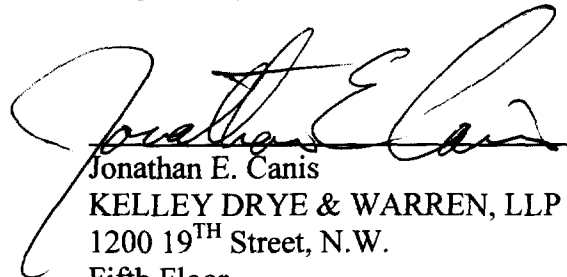
<sup>58</sup> Ameritech at 17-18; Bell Atlantic at 21; U S West at 48-49.

the networks of both ILECs and competitive carriers. The BOCs will therefore be migrating more and more of their loop facilities to DSL technology in the coming years. Simply by doing so, they will be able to avoid offering these facilities as unbundled network elements or resale services – ultimately, the BOCs' entire local networks will be out of the reach of CLECs.<sup>59</sup>

## V. CONCLUSION

For the reasons discussed above, Intermedia respectfully requests that the Commission deny the BOCs' petitions to deregulate their data networks and services.

Respectfully submitted,



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<sup>59</sup> The only possible alternative would be to have the ILECs strip the xDSL electronics off any loop that a CLEC wishes to purchase as an element or resell. This outcome would, of course, be nonsensical, requiring the BOCs or the CLECs to incur the cost of de-conditioning the loops to make them available to CLECs.

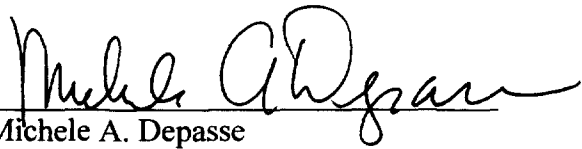


CERTIFICATE OF SERVICE

I hereby certify that I have, this \_\_\_\_ day of April, 1998, served this day a copy of the foregoing INTERMEDIA COMMUNICATIONS INC. COMMENTS OPPOSING DEREGULATION OF INCUMBENT LOCAL EXCHANGE CARRIER DATA NETWORKS AND SERVICES by hand delivery to the following:

Janice Myles  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 544  
Washington, D.C. 20554

International Transcription Service  
1231 - 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

  
Michele A. Depasse

CERTIFICATE OF SERVICE

I hereby certify that I have, this 24 day of April, 1998, served this day a copy of the foregoing ERRATUM TO INTERMEDIA COMMUNICATIONS INC. COMMENTS OPPOSING DEREGULATION OF INCUMBENT LOCAL EXCHANGE CARRIER DATA NETWORKS AND SERVICES by hand delivery to the following:

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